APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-1665

SHERBROOKE TURF, INC.,

Plaintiff-Appellant,

v.

MINNESOTA DEPARTMENT OF TRANSPORTATION, ET AL.,

Defendants-Appellees,

UNITED STATES OF AMERICA, ET AL.,

Intervenor Defendant Appellees.

Appeal from the United States District Court
for the District of Minnesota

No. 02-3016

GROSS SEED COMPANY,

Plaintiff-Appellant,

v.

NEBRASKA DEPARTMENT OF ROADS, ET AL.,

Defendants-Appellees,

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL.,

Intervenor Defendant Appellees.

Appeal from the United States District Court
for the District of Nebraska

Submitted: May 15, 2003
Filed: October 6, 2003

Before LOKEN, Chief Judge, FAGG and MURPHY, Circuit Judges.

LOKEN, Chief Judge.

Since 1982, the federal highway statutes have required that ten percent of federal highway construction funds be paid to small businesses owned and controlled by "socially and economically disadvantaged individuals," as that term is defined in § 8(d) of the Small Business Act (15 U.S.C. § 637). *See* Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2097, 2100. Two non-minority contractors filed these separate actions challenging the current statute and Department of Transportation (DOT) regulations, as implemented in Minnesota and Nebraska. In the Minnesota action, plaintiff Sherbrooke Turf, Inc. ("Sherbrooke"), sued the Minnesota Department of Transportation (MnDOT) and its Commissioner to enjoin this aspect of the State's federally-assisted highway program. In the Nebraska action, plaintiff Gross Seed Company ("Gross Seed") sued the Nebraska Department of Roads (NDOR) and its Direc-

tor.[1] In each case, with the constitutionality of a federal statute at issue, the United States and DOT intervened as additional defendants. In the Minnesota action, the Associated General Contractors of America and its Minnesota affiliate appeared as amicus on behalf of plaintiff Sherbrooke.

Sherbrooke and Gross Seed provide landscaping services to prime contractors on federally assisted highway projects. In each lawsuit, the district court[2] held that the subcontractor plaintiff has standing to assert its constitutional claims. We agree. The stipulated facts demonstrate that Sherbrooke and Gross Seed have bid on federally assisted highway projects in the past, will continue to bid in the future, and suffer competitive harm when contracts are awarded to others under DOT's Disadvantaged Business Enterprises (DBE) program. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211-12 (1995). Turning to the merits, the district courts concluded that the DBE program as implemented in Minnesota and Nebraska satisfies strict scrutiny review, both facially and as applied, as the Tenth Circuit concluded following the Supreme Court's remand in *Adarand*. *Adarand Constructors, Inc v. Slater*, 228 F.3d 1147 (10th Cir. 2000) (*Adarand II*), *cert. granted then dismissed as improvidently granted*, 532 U.S. 941, 534 U.S. 103 (2001). Sherbrooke and Gross Seed appeal, arguing the district courts erred in concluding that the federal DBE program satisfies strict scrutiny and in

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[1] Eleventh Amendment immunity may bar the claims against MnDOT and NDOR, which are state agencies, but the state officials may be sued for injunctive relief. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66-67, 71 n.10 (1989).

[2] In the Minnesota action, the HONORABLE JAMES M. ROSENBAUM, Chief Judge of the United States District Court for the District of Minnesota. In the Nebraska action, the HONORABLE LYLE E. STROM, United States District Judge for the District of Nebraska.

concluding that Minnesota and Nebraska need not establish that their implementation of the DBE program survives independent strict scrutiny review as well. We affirm.

I. The Legislative Background.

Prior to the 1982 statute designating ten percent of federal highway funds for minority small business contractors, a comparable provision in the Public Works Employment Act of 1977 was upheld in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). However, the constitutionality of mandatory set-asides based on racial factors was placed in doubt by later Supreme Court's decisions -- *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 498-99 (1989), which struck down the City's thirty percent set-aside for minority small businesses, and *Adarand*, which held that all government race-based classifications are subject to strict judicial scrutiny. 515 U.S. at 235. Following *Adarand*, the District of Minnesota invalidated the statutory ten percent set-aside of federal highway funds and DOT's then-existing regulations, "as applied to highway construction contracts in the State of Minnesota." *In re Sherbrooke Sodding Co.*, 17 F. Supp. 2d 1026, 1037-38 (D. Minn. 1998). As a result, the DBE program was suspended in Minnesota in 1999.

In the wake of these judicial decisions, Congress passed the Transportation Equity Act for the 21st Century ("TEA-21"), which continued the ten percent designation subject to DOT implementation. Pub. L. No. 105-178, § 1101(b)(1), 112 Stat. 107, 113. DOT then promulgated the new implementing regulations here at issue in 49 C.F.R. pt. 26. *See* 64 Fed. Reg. 5096 (Feb. 2, 1999).

The revised DBE program provides contracting advantages to small businesses owned and controlled by "socially and economically disadvantaged individuals." "Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5). "Economically dis-

advantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. § 637(a)(6)(A). In determining whether a contractor qualifies as a DBE, grantee States must employ a rebuttable presumption that women and members of most racial minority groups are socially and economically disadvantaged. *See* TEA-21, § 1101(b)(2)(B), 112 Stat. at 113, incorporating 15 U.S.C. § 637(d)(3)(C) and 13 C.F.R. § 124.103(b). An individual whose personal net worth exceeds $750,000 is not economically disadvantaged. *See* 49 C.F.R. § 26.67(b). Small businesses do not qualify if their earnings exceeded $16.6 million per year in the previous three fiscal years. TEA-21 § 1101(b)(2)(A), 112 Stat. at 113.

II. Strict Scrutiny Review.

Sherbrooke and Gross Seed contend that the federal highway DBE program, on its face and as applied in Minnesota and Nebraska, violates the equal protection component of the Fifth Amendment's Due Process Clause. *Adarand* established that a federal program employing race-based classifications or remedies "must be analyzed by a reviewing court under strict scrutiny." 515 U.S. at 227.[3] Though the DBE program confers benefits on "socially and economically disadvantaged individuals," a term that is facially race-neutral, the government concedes that the program is subject to strict

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[3] Although TEA-21 is in part an exercise of Congress's power under the Spending Clause, that does not affect the constitutional analysis. "Congress may employ racial or ethnic classifications in exercising its Spending or other legislative powers only if those classifications do not violate the equal protection component of the Due Process Clause of the Fifth Amendment." *Fullilove*, 448 U.S. at 480 (plurality opinion); *see United States v. Am. Library Ass'n, Inc.*, 123 S. Ct. 2297, 2303 (2003).

judicial scrutiny, no doubt because the statute employs a race-based rebuttable presumption to define this class of beneficiaries and authorizes the use of race-conscious remedial measures. *See Adarand*, 515 U.S. at 212-13.[4] Thus, the statute's race-based measures "are constitutional only if they are narrowly tailored to further compelling governmental interests." *Grutter v. Bollinger*, 123 S. Ct. 2325, 2337-38 (2003). The Court has cautioned courts conducting this review that strict scrutiny is rigorous but not always "fatal in fact." *Adarand*, 515 U.S. at 237 (quotation omitted).

A. Compelling Governmental Interest.

To survive strict scrutiny, the government must first articulate a legislative goal that is properly considered a compelling government interest. Neither Sherbrooke nor Gross Seed challenges the district courts' conclusion that Congress and DOT acted to further a compelling interest. As the Tenth Circuit said in *Adarand II*, "we readily conclude that the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements." 228 F.3d at 1165; *accord Croson*, 488 U.S. at 492.

In addition to identifying a compelling government interest, the government must demonstrate a "strong basis in the evidence" supporting its conclusion that race-based remedial action was necessary to further that interest. "Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice." *Croson*, 488 U.S. at 500. Sherbrooke and Gross Seed argue that Congress

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[4] However, the fact that the program is tailored to disqualify minority-owned enterprises that are not truly disadvantaged is relevant to the narrow-tailoring aspect of strict scrutiny analysis. *Cf. Adarand*, 515 U.S. at 259-62 (Stevens, J., dissenting).

lacked strong evidence supporting its conclusion that race-based classifications and remedial measures were necessary. They argue that, in enacting TEA-21, Congress had no "hard evidence" of widespread intentional race discrimination in the contracting industry, relying instead on misrepresentations contained in "Appendix I," a Department of Justice summary of more than fifty documents and thirty congressional hearings on minority-owned businesses prepared in response to the *Adarand* decision. *See Appendix -- The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey*, 61 Fed. Reg. 26050 (May 23, 1996). Sherbrooke and Gross Seed point to Government reports and their own expert's report questioning the persistence of racial discrimination in highway construction and argue that we must conduct a de novo review of this legislative record.

We agree we must take a hard look at the evidence, and we have done so. We conclude that Congress had a strong basis in the evidence to support its conclusion that race-based measures were necessary for the reasons stated by the Tenth Circuit in *Adarand II*, 228 F.3d at 1167-76. As the Tenth Circuit's analysis demonstrates, Congress has spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry. In rebuttal, Sherbrooke and Gross Seed presented evidence that the data was susceptible to multiple interpretations, but they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts. Thus, they failed to meet their ultimate burden to prove that the DBE program is unconstitutional on this ground. *See Rothe Dev. Corp. v. U.S. Dep't of Def.*, 262 F.3d 1306, 1317 (Fed. Cir. 2001).

Finally, Sherbrooke and Gross Seed argue that MnDOT and NDOR must independently satisfy the compelling gov-

ernment interest aspect of strict scrutiny review. Under the prior law -- when the ten percent federal set-aside was more mandatory and *Fullilove*, not strict scrutiny, provided the governing constitutional principle -- the Seventh Circuit held that a contractor who conceded the validity of the federal program could not challenge a grantee State for "merely complying with federal law." *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 423 (7th Cir.), *cert. denied*, 500 U.S. 954 (1991); *accord Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 57 (2d Cir. 1992); *Ellis v. Skinner*, 961 F.2d 912, 915 (10th Cir.), *cert. denied*, 506 U.S. 939 (1992); *Tenn. Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6th Cir. 1991). Based on this precedent, the government argues, and the district courts agreed, that participating States need not independently meet the strict scrutiny standard because under the revised DBE program the State must still comply with the DOT regulations. Sherbrooke and Gross Seed respond that the prior cases are distinguishable, and Minnesota and Nebraska DBE programs must independently satisfy strict scrutiny under *Croson*, because the present TEA-21 regime "is characterized by state discretion throughout." This issue was not addressed by the Tenth Circuit in *Adarand II*.

We conclude that neither side's position is entirely sound. Compelling government interest looks at a statute or government program on its face. When the program is federal, the inquiry is (at least usually) national in scope. If Congress or the federal agency acted for a proper purpose and with a strong basis in the evidence, the program has the requisite compelling government interest nationwide, even if the evidence did not come from or apply to every State or locale in the Nation. Thus, we reject appellants' contention that their facial challenges to the DBE program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting *in Minnesota and Nebraska*. On the other hand, a valid race-based program

must be narrowly tailored, and to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed. To the extent the federal government delegates this tailoring function, a State's implementation becomes critically relevant to a reviewing court's strict scrutiny. Thus, we leave this question of state implementation to our narrow tailoring analysis.

B. Is the Revised DBE Program Narrowly Tailored?

In addition to determining that a race-based measure serves a compelling government interest, a reviewing court applying strict scrutiny must determine if the measure is narrowly tailored, that is, whether "the means chosen to accomplish the government's asserted purpose [are] specifically and narrowly framed to accomplish that purpose." *Grutter*, 123 S. Ct. at 2341 (quotation omitted). Sherbrooke and Gross Seed have the ultimate burden of establishing that the DBE program is not narrowly tailored. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 293 (1986) (O'Connor, J., concurring); *Rothe*, 262 F.3d at 1317. While our compelling interest analysis focused on the record before Congress, the narrow-tailoring analysis looks at the roles of the implementing highway construction agencies.

1. Appellants' facial challenge to the DBE program requires us to look carefully at DOT's regulations to determine whether they may be constitutionally applied under any set of factual circumstances. *See United States v. Salerno*, 481 U.S. 739, 746 (1987) (standard for facial challenges). In determining whether a race-conscious remedy is narrowly tailored, we look at factors such as the efficacy of alternative remedies, the flexibility and duration of the race-conscious remedy, the relationship of the numerical goals to the relevant labor market, and the impact of the remedy on third parties. *See United States v. Paradise*, 480 U.S. 149, 171, 187 (1987) (plurality and concurring opinions).

Under the revised DBE program, a State receiving federal highway funds must, on an annual basis, submit to DOT an overall goal for DBE participation in its federally funded highway contracts. *See* 49 C.F.R. § 26.45(f)(1). The overall goal "must be based on demonstrable evidence" as to the number of DBEs who are ready, willing, and able to participate as contractors or subcontractors on federally-assisted contracts. 49 C.F.R. § 26.45(b). The number may be adjusted upward to reflect the State's determination that more DBEs would be participating absent the effects of discrimination, including race-related barriers to entry. *See* 49 C.F.R. § 26.45(d). The State must meet the "maximum feasible portion" of its overall goal through race-neutral means and must submit for approval a projection of the portion it expects to meet through race-neutral means. *See* 49 C.F.R. § 26.51(a), (c). If race-neutral means are projected to fall short of achieving the overall goal, the State must give preference to firms it has certified as DBEs. However, such preferences may not include quotas, and set-aside contracts are limited to those instances "when no other method could be reasonably expected to redress egregious instances of discrimination." 49 C.F.R. § 26.43(b). During the course of a year, if a State determines that it will exceed or fall short of its overall goal, it must adjust its use of race-conscious and race-neutral methods "[t]o ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination." 49 C.F.R. § 26.51(f).

The regulations expressly declare that the statutory ten percent provision "is an aspirational goal at the national level," not a mandatory requirement for grantee States. 49 C.F.R. § 26.41(b). Thus, absent bad faith administration of the program, a State's failure to achieve its overall goal will not be penalized. *See* 49 C.F.R. § 26.47. If the State meets its overall goal for two consecutive years through race-neutral means, it is not required to set an annual overall goal until it does not meet its prior overall goal for a year. *See* 49 C.F.R.

§ 26.51(f)(3). In addition, DOT may grant an exemption or waiver from any or all requirements of the program. *See* 49 C.F.R. § 26.15(b).

Like the district courts, we conclude that the DOT regulations, on their face, satisfy the Supreme Court's narrow tailoring requirements. First, the regulations place strong emphasis on "the use of race-neutral means to increase minority business participation in government contracting." *Adarand*, 515 U.S. at 237-38 (quotation omitted). "Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative," but it does require "serious, good faith consideration of workable race-neutral alternatives." *Grutter*, 123 S. Ct. at 2344-45. The regulations also prohibit the use of quotas and severely limit the use of set-asides. *See Croson*, 488 U.S. at 496 (discussing quotas).

Second, the revised DBE program has substantial flexibility. A State may obtain waivers or exemptions from any requirement and is not penalized for a good faith failure to meet its overall goal. In addition, the program limits preferences to small businesses falling beneath an earnings threshold, and any individual whose net worth exceeds $750,000 cannot qualify as economically disadvantaged. *See* 49 C.F.R. § 26.67(b). Likewise, the DBE program contains built-in durational limits. A State may terminate its DBE program if it meets its annual overall goal through race-neutral means for two consecutive years. 49 C.F.R. § 26.51(f)(3). Moreover, TEA-21 is subject to periodic congressional reauthorization. Periodic legislative debate "assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." *Grutter*, 123 S. Ct. at 2346 (quotation omitted).

Third, DOT has tied the goals for DBE participation to the relevant labor markets. The regulations require grantee States to set overall goals based upon the likely number of minority contractors that would have received federally as-

sisted highway contracts but for the effects of past discrimination. *See* 49 C.F.R. § 26.45(c)-(d) (Steps 1 and 2). Though the underlying estimates may be inexact, the exercise requires the States to focus on establishing realistic goals for DBE participation in the relevant contracting markets. This stands in stark contrast to the program struck down in *Croson*, which "rest[ed] upon the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." 488 U.S. at 507 (quotation omitted).

Finally, Congress and DOT have taken significant steps to minimize the race-based nature of the DBE program. Its benefits are directed at all small businesses owned and controlled by the socially and economically disadvantaged. While TEA-21 creates a rebuttable presumption that members of certain racial minorities fall within that class, the presumption is rebuttable, wealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively disadvantaged but can demonstrate actual social and economic disadvantage. Thus, race is made relevant in the program, but it is not a determinative factor. *See Grutter*, 123 S. Ct. at 2345-46; *Gratz v. Bollinger*, 123 S. Ct. 2411, 2429 (2003) (criticizing a University of Michigan program that automatically awarded twenty points to minority applicants, without individualized consideration).

For these reasons, we agree with the district courts that the revised DBE program is narrowly tailored on its face.

2. Sherbrooke and Gross Seed also argue that the revised DBE program as applied in Minnesota and Nebraska is not narrowly tailored. As noted previously, because the revised DBE program affords grantee States substantial discretion, this contention requires us to examine the program as implemented by those States. Under the revised federal program, States "set their own goals, based on local market conditions; their goals are not imposed by the federal government nor do

recipients have to tie them to any uniform national percentage." 64 Fed. Reg. at 5102.

Minnesota. Following promulgation of the current DOT regulations, MnDOT commissioned National Economic Research Associates (NERA) to study the highway contracting market in Minnesota. NERA first determined that DBEs made up 11.4 percent of the prime contractors and subcontractors in the highway construction market. *See* 49 C.F.R. § 26.45(c) (Step 1). Of this number, 0.6 percent were minority-owned and 10.8 percent women-owned. Based upon its analysis of business formation statistics, NERA next estimated that the number of participating minority-owned businesses would be 34 percent higher in a race-neutral market. Therefore, NERA adjusted its DBE availability figure from 11.4 to 11.6 percent. *See* 49 C.F.R. § 26.45(c) (Step 1). Based on NERA's study, MnDOT adopted an overall goal of 11.6 percent DBE participation for federally assisted highway projects in fiscal year 2001. MnDOT predicted that it would need to meet nine percent of that overall goal through race- and gender-conscious means, based on the fact that DBE participation in state highway contracts dropped from 10.25 percent in 1998 to 2.25 percent in 1999, when its previous DBE program was suspended by the district court's injunction in *Sherbrooke*. To meet its overall goal, MnDOT required each prime contract bidder to make a good faith effort to subcontract a prescribed portion of the project to DBEs. MnDOT determines that portion based on several individualized factors, including the availability of DBEs and the extent of subcontracting opportunities on the project.

DOT approved this MnDOT program for Fiscal Year 2001. Sherbrooke presented evidence attacking the reliability of the data NERA used in determining its recommended overall goal. But Sherbrooke failed to establish that better data was available or that MnDOT was otherwise unreasonable in undertaking this thorough analysis and in relying on its results. The precipitous drop in DBE participation in 1999, when no

race-conscious methods were employed, supports MnDOT's conclusion that a substantial portion of its 2001 overall goal could not be met with race-neutral measures, and there is no evidence that MnDOT failed to adjust its use of race-conscious and race-neutral methods as the year progressed, as the DOT regulations require. On this record, we agree with the district court that the revised DBE program serves a compelling government interest and is narrowly tailored, on its face and as applied in Minnesota. Accordingly, the court properly granted summary judgment dismissing Sherbrooke's claims.

Nebraska. To implement the revised federal DBE program, NDOR commissioned MGT of America, Inc., to conduct availability and capability studies of DBE firms in the Nebraska highway construction market. The availability study found that between 1995 and 1999, when Nebraska followed the then-mandatory ten percent set-aside requirement, 9.95 percent of all available and capable firms were DBEs, and DBE firms received 12.67 percent of the contract dollars on federally assisted projects. After apportioning part of this DBE contracting to race-neutral contracting decisions, MGT recommended that NDOR set an overall goal of 9.95 percent DBE participation and predict that 4.82 percent of this overall goal would have to be achieved by race- and gender-conscious means. NDOR adopted these recommendations in its submission to DOT for Fiscal Year 2001. NDOR required that prime contractors make a good faith effort to allocate a set portion of each contract's funds to DBE subcontractors. DOT approved this NDOR program for fiscal year 2001. Having carefully reviewed the trial record, we conclude that Gross Seed, like Sherbrooke, failed to prove that the revised DBE program is not narrowly tailored as applied in Nebraska. Accordingly, the district court properly entered post-trial judgment dismissing Gross Seed's claims.

The judgments of the district courts are affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

GROSS SEED COMPANY, a Nebraska corporation,	)	
Plaintiff,	)	4:00CV3073
v.	)	
NEBRASKA DEPARTMENT OF ROADS, and JOHN L. CRAIG, in his capacity as the Director of the Nebraska Department of Roads;	)	MEMORANDUM OPINION
Defendants,	)	
UNITED STATES DEPARTMENT OF TRANSPORTATION; and FEDERAL HIGHWAY ADMINISTRATION,	)	
Intervenors.	)	

Filed May 6, 2002

This matter came on for trial to the Court commencing June 18, 2001, and concluding on June 26, 2001. The parties submitted post-trial briefs and the matter is now ready for decision. Pending at the time of the trial was the Federal de-

fendants' motion for summary judgment (Filing No. 85). That motion will be denied as moot.

Having considered the evidence, consisting of the testimony of eleven witnesses and 174 exhibits, the respective trial and post-trial briefs of the parties, the Court, pursuant to Fed.R.Civ.P. 52, now makes the following findings of fact and conclusions of law.

BACKGROUND

Stipulated facts:

In the pretrial order (Filing No. 138), the parties agreed that the following facts may be accepted as established for the purposes of this case:

1) Plaintiff Gross Seed Company is a Nebraska corporation specializing in landscaping, which regularly bids on federally assisted highway construction contracts. Gross Seed Company bids on highway construction contracts both as a prime and subcontractor.

2) Defendant John L. Craig is Director of the Nebraska Department of Roads (NDOR).

3) John Gross, a white male, is the President of Gross Seed Company and owns 50% of its issued stock.

4) Peggy L. Gross, the wife of John Gross and a Director of Gross Seed Company, owns 50% of the issued stock in that company. Ms. Gross is also the owner of North Central Contracting, an entity certified as a Disadvantaged Business Enterprise (DBE) in Nebraska and South Dakota.

5) On June 9, 1998, the President signed into law the Transportation Equity Act for the 21st Century (TEA-21), Pub.L. 105-178, 112 Stat. 107 (1998), the current U.S. Department of Transportation (DOT) authorization Act for federal highway transit programs.

6) Section 1101(b) of TEA-21[1] reauthorized the Disadvantaged Business Enterprise (DBE) program that had been established in earlier DOT statutory provisions.[2]

7) DOT adopted a new regulatory program implementing the DBE provisions of TEA-21 that was published at 64 Fed. Reg. 5095, *et seq.*, (February 2, 1999) and is codified at 49 C.F.R. Part 26. These DBE regulations took effect on February 2, 1999.

8) Under 49 C.F.R. Part 26, recipients of federal aid highway funds such as NDOR are required as a condition of receiving such funds to adopt a DBE program consistent with the requirements of Part 26 and to submit that program to the DOT for its review and approval.

9) A requirement of the DOT DBE program is that recipients, such as NDOR, establish an annual or overall goal for participation in DOT-assisted contracts.

10) 49 C.F.R. Part 26 provides that whenever possible, recipients of TEA-21 federal highway funds must attempt to meet their overall goals for DBE participation through race and gender-neutral means.

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[1] Section 1101(b) (1) of TEA-21 provides in part, as follows: ("Except to the extent the Secretary determines otherwise, not less than 10 percent of the amounts authorized to be appropriated under [the Act] shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." Section 1101(b) also states that women and members of minority groups identified in 8(d) of the Small Business Act are presumed to be socially and economically disadvantaged for purposes of the Disadvantaged Business Enterprise (DBE) Program.

[2] *See, e.g.*, § 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub.L. No. 102-240, 105 Stat. 1914; § 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub.L. No. 100-17, 101 Stat. 132.

11) NDOR is now and at all relevant times has been a recipient to federal-aid highway funds authorized by TEA-21.

12) NDOR conducted an analysis to establish an overall goal for the DBE participation.

13) NDOR established an overall goal for Fiscal Year 2000 of 11% and stated its intent to meet approximately 21% of that goal (i.e., a total of 2.33% overall) through race- and gender-neutral methods.

14) DOT approved NDOR's methodology for establishing its overall goal for DBE participation on federally-assisted contracts and the portion to be achieved through race- and gender-neutral means on March 20, 2000, pursuant to 49 C.F.R. § 26.51(c).

15) On October 30, 2000, based on an availability study conducted by a consultant, MGT of America, NDOR submitted to DOT a proposed overall goal of 9.95% for fiscal year 2001, with a race- and gender-conscious goal of 4.82% and a race- gender-neutral goal of 5.13% DOT currently is reviewing that proposed goal.

16) DOT has approved use of NDOR's proposed DBE goals for fiscal year 2001, pending completion of its review of those goals.

Controverted issues

In the pretrial order, the parties agreed that the following were the issues remaining to be determined and resolved by the Court:

1) Whether the DBE program authorized by TEA-21 is narrowly tailored to satisfy a compelling government interest.

2) Whether the regulations set forth in 49 C.F.R. Part 26 are narrowly tailored to satisfy a compelling government interest.

3) Whether the Nebraska Department of Roads' DBE Program is narrowly tailored to satisfy a compelling government interest.

4) Whether the DBE provisions set forth in TEA-21 are an unlawful and improper exercise of Congress' powers under the United States Constitution.

5) Whether the gender-conscious provisions of the DBE program authorized by TEA-21 are substantially related to the achievement of important governmental objectives.

6) Whether the plaintiff has standing.

BACKGROUND

In June of 1998, Congress enacted the Transportation Equity Act for the 21st Century (TEA-21). Pub.L. No. 105-178, 112 Stat. 107 (1998). TEA-21 provides for the participation of disadvantaged business enterprises in federally funded highway programs. Pursuant to the statute, regulations were promulgated by the United States Department of Transportation (USDOT) for its enforcement. 49 C.F.R. Part 26 (2000).

Generally, TEA-21 provides that "not less than 10 percent" of the federal funds expended under the statute should be used for the services of socially and economically disadvantaged businesses. The statute refers to the Small Business Act to define socially and economically disadvantaged individuals to include women, Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act. 15 U.S.C. § 637(d)(1) and (3)(C) and (D).

The regulations require States to implement a Disadvantaged Business Enterprise (DBE) program to obtain federal financial assistance for state highway projects. 49 C.F.R. § 26.1. The state must then submit the plan to the USDOT for approval. A state may obtain a waiver of the requirement if the state demonstrates it can reach a level playing field for

DBE's without the implementation of the program. 49 C.F.R. § 26.15.

The Nebraska Department of Roads (NDOR) adopted a program pursuant to the regulations and established an overall goal for fiscal year 2001 of 9.95% (DBE) participation in federally assisted highway projects (See Exhibits 201, 202 and 203). Based upon a disparity study conducted by MGT of America (Exhibit 202), NDOR submitted that it could reach 5.13% by race and gender-neutral measures, and the other 4.82% by race and gender-conscious means. The US-DOT approved the proposed goal. The other provisions relating to the program will be addressed in the following discussion.

The plaintiff in this case is a company which is 50% owned by a white male, John C. Gross. Mr. Gross also testified that he is the president of the company and that he controls all the general matters of the business (Tr. 1369-70). The plaintiff does not qualify as a socially and economically disadvantaged business under TEA-21, its implementing regulations, or NDOR's DBE program.

DISCUSSION

I. Standing.

The first issue to be resolved is the State defendants' contention that plaintiff does not have standing to maintain this action seeking forward-looking relief. In the second amended complaint (Filing No. 66), plaintiff states that he is seeking "a permanent injunction against enforcement and a declaration of unconstitutionality of § 1101(b) of the Transportation Equity Act for the 21st Century, Pub.L. 105-178 (hereinafter TEA-21), 49 C.F.R. Part 26, and the Nebraska Department of Roads Disadvantaged Business Enterprises (DBE) program, which, facially and as applied, discriminate on the basis of race and gender in the award of federal-aid highway contracts in Nebraska.

Jurisdiction is premised on 28 U.S.C. § 1331(a) and pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, and pursuant to 28 U.S.C. § 1343(a)(3) and (4). *See also* 5 U.S.C. § 702 and 28 U.S.C. § 1347. Venue is appropriate pursuant to 28 U.S.C. § 1391.

The State defendants argue in their brief that plaintiff has not alleged an "imminent" injury. In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995) (*Adarand III*), the United States Supreme Court addressed the plaintiff's claim that the government program denied it equal protection of the laws, thus requiring an injunction against the enforcement of the statute. Specifically, the Supreme Court examined whether the plaintiff "made an adequate showing that some time in the relatively near future, it will bid on another Government contract that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors." *Adarand III*, 515 U.S. at 211. The Supreme Court found that the plaintiff need not demonstrate that it will be a low bidder on the contract because the injury is the inability to compete on equal footing for the contract. *Id.*

The stipulated facts and the testimony of Mr. Gross at trial and by deposition establish that he not only has bid on federal highway work in Nebraska in the past but that he will continue to bid on the work. He stated that he bids as a subcontractor and on a limited basis as a prime contractor. This testimony is sufficient to demonstrate that the plaintiff has standing to challenge TEA-21, its implementing regulations, and the Nebraska Department of Roads program adopted pursuant to the regulations. *Adarand III*, *supra*.

II. Equal Protection.

While Congressional enactments are usually presumed constitutional, a statute which uses race-based classifications is presumed unconstitutional. *Personnel Adm'n v. Feeney*, 442 U.S. 256, 272 (1979). In *Adarand III*, the Supreme Court made clear that all classifications imposed by a government actor, based upon race, are to be analyzed under

strict scrutiny. *Adarand III*, 515 U.S. at 227. To be constitutional, such classifications must be narrowly tailored to further a compelling governmental interest. *Id.* at 227. Classifications based upon gender are subject to intermediate scrutiny. The Federal Defendants acknowledge the application of intermediate scrutiny to gender-based classifications. However, they suggest that the Court need not address the gender-based portions separately, as they will meet the more rigorous standard of strict scrutiny. The Court has concluded that both meet the strict scrutiny standard and so will discuss both classifications together.

In other words, the government must show the classification serves an important governmental interest and that the discretionary means are substantially related to serve that interest. *United States v. Virginia*, 518 U.S. 515, 533 (1996); *In re Sherbrooke Sodding Co.*, 17 F.Supp.2d 1026, 1033 (D.Minn. 1998).

A. Racial and Gender Classification - Strict Scrutiny

1. Compelling Interest

The compelling interest prong of strict scrutiny has three parts. First, a court must determine whether the government has articulated a goal that is a "compelling interest" under the governing law. Next, the court must determine if actual evidence supports the goal. Finally, the court examines whether the challenger has rebutted the evidence submitted by the government.

Turning to the first prong, Congress stated that the DBE program of TEA-21 was necessary to remedy discrimination in the construction industry. H. Rep. 105-550. The United States Supreme Court has previously recognized that the government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of funds and in remediating the effects of past discrimination. *City of Richmond v. Croson*, 488 U.S. 469, 491-92 (1969).

Thus, the Court must determine whether actual evidence supports a finding of the existence of past discrimination.

The government also has a significant interest in remedying the effects of past discrimination based upon gender. *See United States v. Virginia*, 518 U.S. 515, 531 (1996) (stating that the Court has long recognized the history of sex discrimination in this country). *See also California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 289 (1987) (holding that the government has an important governmental interest in promoting equal employment opportunities for women).

Ultimately, the Court must determine whether there is a strong basis in evidence for the conclusion that remedial action was necessary. *Concrete Works of Colorado, Inc. v. Denver*, 36 F.3d 1513, 1520 (1994). However, like the parties in *Concrete Works*, the parties in this case disagree as to what evidence the Court should examine to determine if there is a strong basis. *See Concrete Works*, 36 F.3d at 1520. In examining whether evidence supports a finding of discrimination to, in turn, support a compelling interest, the court may look at both statistical and anecdotal evidence. *Id.* at 1530. In addition, the Court should consider both direct and circumstantial evidence, including pre-enactment and post-enactment evidence. *Id.* Finally, public and private discrimination in both specific areas of government contracts and the construction industry generally, are relevant. *Id.*

Plaintiff suggests that even though Congress has studied and legislated on the need for this type of remedial legislation for many years, it is still necessary that the present record made by Congress to support TEA-21 must include the prior studies and debates conducted by and before Congress. The Supreme Court had recognized in *Fullilove v. Klutznick*, 448 U.S. 448, 503, 100 S. Ct. 2758, 65 L.Ed.2d 902 (1980) that "[a]fter Congress has legislated repeatedly in an area . . . that may reduce the need for fresh hearings and long debates. . . ." *See also Owen Okruhlick v. University of Arkansas*, 255 F.3d 615, 625 (8th Cir. 2001). That is the case here. Based on the

evidence presented and considering the history of this legislation, the Court finds that the federal government's evidence is sufficient to demonstrate past discrimination does exist in the construction industry. Furthermore, the Court finds that racial and gender discrimination within the construction industry is sufficient to demonstrate a compelling interest in individual areas, such as highway construction.

2. Narrowly Tailored

Next, the Court turns to the second prong of the strict scrutiny analysis -- narrow tailoring. In *United States v. Paradise*, 480 U.S. 149, 171 (1987), the United States Supreme Court articulated several factors to determine whether a race-conscious remedy is appropriate: "the necessity for relief and efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties."

a. Necessity for Relief and Efficacy of Alternative Remedies

This factor requires the Court to determine if there has been inquiry into the use of race-neutral means to increase minority business participation. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237-38 (1995). At trial, the Federal Defendants presented evidence that Congress, through extensive research and hearings, determined that race-neutral measures alone would not entirely remedy the problem of past discrimination. In implementing this legislation, the Department of Transportation has adopted rules governing participation by disadvantaged business enterprises in the Department's programs. *See* 49 C.F.R. Part 26. Section 26.51 which deals specifically with race neutral and race conscious means provides that participating states must meet the maximum feasible portion of their overall goal by using race-neutral means of facilitating DBE participation. Race conscious means must be used to meet that portion of the State's

goal not achieved through the use of race-neutral means. The evidence sufficiently demonstrates the necessity of the program as designed.

b. Flexibility and Duration of Relief

Flexibility largely depends upon the availability of waiver out of the discriminatory requirements, which is a part of TEA-21. 49 C.F.R. § 26.15. Plaintiff agrees with defendants that the federal program is flexible. A program must also have a limited duration.

A program which employs discriminatory practices must not last longer than necessary to eliminate the discrimination. *Adarand*, 515 U.S. at 273-38. TEA-21 and its implementing regulations expire in 2004, unless Congress reauthorizes the program. Prior to reauthorization, Congress must reevaluate to determine if the program is still necessary. Furthermore, internally, the federal program has salary caps. In other words, when an individual's net worth is over $750,000, the individual's company is no longer qualified as a DBE. For these reasons, the Court finds that this factor is met in this case.

c. Relationship of numerical goals to the relevant labor market

In *Croson v. City of Richmond*, the United States Supreme Court struck down a quota that "rest[ed] upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Croson v. City of Richmond*, 488 U.S. 469, 507 (1989). The Federal Defendants point to the necessity that a state set annual overall goals that reflect market conditions that would be achieved if discrimination was lacking.

An examination of the enabling statute and the regulations adopted by the United States Department of Transportation provide a reasonable means to address the discrimination

which congressional studies have found exist in the construction industry.

d. Impact of relief on Third Parties

Innocent persons may bear some burden of remedial measures to eradicate past discrimination. *Fullilove*, 448 U.S. at 484. However, the limit on this burden is found in the "good faith" provisions for contractors when contract goals are set. 49 C.F.R. § 26.53.

Having examined the legislative history and the regulations adopted by the Department of Transportation, the Court is satisfied that the evidence establishes a compelling interest for the adoption of TEA-21 and Part 26 of the Code of Regulations, 49 C.F.R. Part 26.

e. NDOR Program

The evidence clearly establishes that NDOR's DBE program (Exhibits 201, 202, and 203) was adopted to comply with 49 C.F.R. Part 26. The plaintiff suggests that the State independently establish that a compelling interest exists in Nebraska and that its program is narrowly tailored to meet that compelling interest. In *Sherbrooke Turf, Inc. v. Minnesota Dept. of Transportation, supra*, Judge Rosenbaum articulately rejects this contention, citing *Milwaukee County Pavers Assoc. v. Fiedler*, 922 F.2d 429, 423 (7th Cir. 1991); *see also Ellis*, 961 F.2d at 916 (10th Cir. 1992); *Tennessee Asphalt Co. v. Farris*, 542 F.2d 696, 975 (6th Cir. 1991). When a state participates in a heavily regulated federal program, such as the DBE program, it is not necessary that it independently prove that its program meets the strict scrutiny standard. In *Milwaukee County Pavers Assoc.*, *supra*, at 424, the Court stated:

> Insofar as the State is merely doing what the statute and regulations envision and permit, the attack on the state is an impermissible collateral attack on the statute and its regulations.

For these reasons, the Court concludes that the State need not independently establish that its program meets strict scrutiny, and its program will be approved as the Court has found that TEA-21 and 49 C.F.R. Part 26 meet the requirements of strict scrutiny and are, therefore, constitutional. A separate judgment will be entered in accordance with this memorandum opinion.

DATED this 6th day of May, 2002.

BY THE COURT:

/s/

Lyle E. Strom, Senior Judge
United States District Court